Supreme Court, U.S.
FILED
AUG 12 1992
OFFICE OF THE CLERK

NO. 92-83
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

JOHN D. TURNER,

Petitioner,

v.

FINANCIAL CORPORATION OF AMERICA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

GIBSON, DUNN & CRUTCHER
PETER J. THURSTON*
EDWARD W. SMITHERS
50 W. San Fernando St.
San Jose, CA 95113
(408) 998-2000

Attorneys for Respondents,
WILLIAM J. POPEJOY,
VICTOR H. INDIEK,
MERRILL BUTLER,
DONALD E. ROYER,
and NEIL N. STOLZ

PAUL HASTINGS, JANOFSKY & WALKER
555 South Flower St.
22nd Floor
Los Angeles, CA 90071
(213) 489-4000

Attorneys for Respondent,
J. RALPH STONE

BARTON KLUGMAN & OETTING
RICHARD F. OETTING
PAUL I. WAPNER*
333 South Grand Ave.
Los Angeles, CA 90071
(213) 621-4000

Attorneys for Respondents
ROBERT M. BARTON,
ANNELISE G. ANDERSON,
and EDWIN L. JOHNSON

LATHAM & WATKINS
HUGH STEVEN WILSON
JOHN P. FLYNN
555 South Flower St.
Suite 4600
Los Angeles, CA 90071
(213) 485-1234

Attorneys for Respondent,
LAWRENCE K. ROOS

*Counsel of Record

McCUTCHEN, DOYLE, BROWN
& ENERSEN
JOHN R. REESE*
DALE E. BARNES, JR.
Three Embarcadero Center
San Francisco, CA 94111

Attorneys for
Respondent,
KPMG PEAT MARWICK

*Counsel of Record

QUESTIONS PRESENTED

Pro se petitioner John D. Turner ("Turner") filed a securities fraud suit arising out of his purchase of 90,000 shares of Financial Corporation of America ("FCA") common stock ("Stock"). The Stock was purchased by Turner at progressively lower prices from April 1986 through April 1987 at a cost of $816,125. FCA Stock continued to drop in price, and Turner ultimately brought suit. The United States District Court for the Northern District of California granted summary judgment for defendants on the grounds that the risky nature of FCA Stock was well disclosed in its 10-K filings and the media, and that Turner did not rely on any alleged misrepresentations or omissions when purchasing FCA Stock. The Ninth Circuit affirmed in an unreported decision.

In this context, Turner's issues for review are fairly summarized as follows:

1. Did the Ninth Circuit err in its

determination of whether alleged misrepresentations and omissions were "material" by considering the total mix of publicly available information, including media stories identifying the speculative nature of the FCA Stock?

2. Did the Ninth Circuit err by ruling that Turner could not establish the reliance element of his securities fraud claim where the undisputed facts showed that Turner performed his own financial analysis, followed the FCA Stock closely, and knew of FCA's financial problems?

The third issue raised by Turner in his petition is a restatement of the first issue.

STATEMENT OF INTERESTED PARTIES

Turner's list of parties incorrectly includes Thomas P. Kemp and Charles E. Young. These parties were excluded from Turner's notice of appeal to the Ninth Circuit, and accordingly the trial court judgment in their favor is final. The Federal Deposit Insurance Corporation is also an interested party.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

STATEMENT OF INTERESTED PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS BELOW 1

JURISDICTION 2

STATUTES AND RULES INVOLVED 3

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 9

REASONS FOR DENYING THE PETITION 13

1. The Ninth Circuit Properly Applied the Standard For Summary Judgment 14

2. The Ninth Circuit Properly Applied The Standards For Materiality of and Reliance on Alleged Misrepresentations 15

3. The Ninth Circuit Properly Applied The Standards For Materiality of and Reliance on Alleged Omissions 17

4. The Ninth Circuit's Decision Is Not Premised Upon A Fraud On The Market Theory 20

CONCLUSION 22

APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Basic, Inc. v. Levinson,
485 U.S. 224 (1988) 9, 13

Blackie v. Barrack,
524 F. 2d 891 (1975),
cert. den. 429 U.S. 816 (1976) . . 20

In re Apple Computer Securities Litigation,
866 F.2d 1109 (9th Cir. 1989),
cert. den. 496 U.S. 942 (1990) 13, 14

In re Meridian Securities Litigation,
772 F. Supp. 223 (E.D. Pa. 1991) . 15

Virginia Bankshares, Inc. v. Sandberg,
___ U.S. ____, 111
S. Ct. 2749 (1991) 9, 13

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

NO. 92-83

JOHN D. TURNER,

Petitioner,

v.

FINANCIAL CORPORATION OF AMERICA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

Respondents William J. Popejoy, Victor H. Indiek, Merril Butler, Donald E. Royer, Neil N. Stolz, J. Ralph Stone, Robert M. Barton, Annelise G. Anderson, Edwin L. Johnson, Lawrence K. Roos and KPMG Peat Marwick respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's decision in this case.

OPINIONS AND ORDERS BELOW

The February 21, 1992 unreported decision of the United States Court of

Appeals for the Ninth Circuit affirming the summary judgment in favor of respondents is reproduced in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1a-21a. The June 1, 1990 Amended Memorandum and Order of District Court granting summary judgment in favor of respondents is unreported and reproduced in Pet. App. at 25a-51a.

JURISDICTION

The Court of Appeals entered judgment on February 21, 1992. Pet. App. at 23a-24a. Petitioner's petition for rehearing was denied on April 1, 1992. Pet. App. at 22a. The petition for writ of certiorari was initially served on June 19, 1992, and rejected for non-compliance with the Rules of the Supreme Court of the United States. A subsequent petition for writ of certiorari was served on July 6, 1992, seeking to invoke the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Section 10b of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, and Rule § 240.10b-5 promulgated thereunder are reproduced in Pet. App. at 235a-237a. Federal Rule of Civil Procedure 56 and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, are reproduced in Respondents' Appendix at 1a-3a, infra.

STATEMENT OF THE CASE

A. Introduction.

This suit arises out of Turner's unsuccessful investment in FCA Stock. Turner purchased 90,000 shares of FCA Stock for $816,125 at progressively lower prices during a one year period from April 1986 through April 1987. Turner seeks to invoke the federal securities laws to recover that sum from virtually all persons associated with FCA during his one-year buying binge, including certain officers and directors, as well as FCA's auditors. The District

Court dismissed his claims pursuant to Fed. R. Civ. P. 56, finding that Turner was well aware of the risks associated with his purchases. The Ninth Circuit, after a thorough review of the record, affirmed.

FCA, and its wholly-owned subsidiary American Savings and Loan Association ("American"), were much in the news two years prior to Turner's initial April, 1986 Stock purchase. Following a Securities Exchange Commission investigation, FCA was forced to restate its income at June 30, 1984 from a $75.3 million gain to a $79.9 million loss. A subsequent loss of investor confidence in American resulted in a run on deposits of approximately $6.8 billion. The Stock price fell from a January 1984 high of $24 1/4 to a low of $5 1/8 in August 1984. The management of American, led by Charles Knapp, resigned in August 1984 following allegations of unsafe banking practices. Defendant Popejoy began

as Chief Executive Officer on August 28, 1984.

Turner, a mortgage broker with thirty years of experience in the real estate industry, initially purchased 5,000 shares of FCA Stock on April 23, 1986 at prices of $12 3/8 and $12 3/4 per share. Prior to that initial purchase, Turner reviewed the 1985 10-K which disclosed the following financial problems of FCA:

1. loan loss reserves were increased by $422 million as of December 31, 1984;

2. loan loss reserves were increased by $182 million as of December 31, 1985;

3. the investigation of the loan portfolio was on-going; and

4. FCA was being sued in various shareholder class action suits arising out of the activities of the Knapp management which had been tentatively settled in the range of $32.0 - $42.7 million.

Pet. App. at 13a-14a.

As a part of his decision to purchase additional FCA Stock, Turner subscribed to

various stock reporting services. These services studied by Turner, candidly apprised him of the "risky" nature of the FCA Stock. Pet. App. at 212a, May 16, 1986 Valueline Article, ("These shares are risky . . . so these extremely volatile shares warrants [sic] a cautious approach even though they're ranked highly for timeliness.") Turner considered the FCA Stock to be undervalued, based upon his own financial analysis. Turner, in fact, candidly admitted at his deposition, that his investment in FCA was "highly risky or speculative." Pet. App. at 41a-42a. As is often the case with such "highly speculative investments," the potential high return was not realized. Turner now seeks to invoke this Court's jurisdiction in an attempt to recoup through litigation the losses that he unquestionably understood might result when he purchased the FCA Stock.

B. Proceedings Below.

Turner initially filed this action on April 21, 1988. Based on Turner's representations that he expected to be represented by counsel, the parties stipulated to a dismissal of his suit without prejudice. Turner then filed his 70-page amended complaint, which was a rambling and disconnected tirade against the savings and loan industry generally, and FCA particularly. Defendants subsequently filed motions to dismiss the amended complaint pursuant to Fed. R. Civ. P. 8, 9(b), and 12(b)(6).

On September 18, 1989, the District Court, in an effort to accommodate a pro se litigant and to more efficiently manage the court's time and resources, ordered that Defendants' motions to dismiss be held in abeyance. The trial court concluded "the best way to get to the heart of this case . . . is to have you [the Defendants] take the plaintiff's deposition and pin

down exactly what representations he does claim he relied on and get the kind of specificity that is necessary." Respondents' App. at 8a. Although the trial court was disposed to dismiss Turner's amended complaint, a more equitable and efficient procedure was followed:

> . . . now you know what the Ninth Circuit would do if I dismissed any of the claims without leave to amend and instructions as how to do it right since Mr. Turner is representing himself. I'm not sure, with all due respect to Mr. Turner, what we are going to get when we get it back . . . .
>
> Because if I had to deal with a motion to dismiss, I would have to dismiss and strike a significant part of it and give you leave to amend, and we would be back here again. I think this advances us much more quickly on where we need to go.

Respondents' App. at 8a-10a.

Turner was deposed during the week of November 9, 1989, after producing his files totalling over 7500 pages concerning FCA. On December 18, 1989, Defendants filed

motions for summary judgment, on the grounds that Turner's testimony made it clear that his claims were not actionable as a matter of law. As part of the motion, a detailed statement of undisputed facts was filed based upon Turner's own deposition testimony and the numerous documents he produced from his FCA file. By amended order on June 1, 1990, the trial court granted Defendants' motions for summary judgment. The Ninth Circuit affirmed in an unpublished decision dated February 21, 1992.

SUMMARY OF ARGUMENT

The Ninth Circuit's affirmance of summary judgment against Turner was premised upon the standards for materiality set forth by this Court in Basic, Inc. v. Levinson, 485 U.S. 224 (1988) and Virginia Bankshares, Inc. v. Sandberg, ____ U.S. ____, 111 S. Ct. 2749 (1991). The Ninth Circuit's adherence to these cases is in

accord with decisions of other federal courts of appeals.

Turner incorrectly asserts that the Ninth Circuit's reliance on the "fraud on the market theory" was contrary to the decisions of the eight courts of appeal [sic] to address the issue. Pet., at 28. In fact, the Ninth Circuit's decision is not premised upon the "fraud on the market" theory. Instead, the decision is based upon the established principles of materiality and reliance as applied to the specifics of Turner's own knowledge about the FCA Stock. There is no conflict among the circuits that would warrant the invocation of this Court's jurisdiction.

The Ninth Circuit painstakingly reviewed the record in this case, concluding that even if knowingly false statements were made, Turner could not establish the reliance element of his claim. Pet. App. at 9a. The Ninth Circuit properly noted that prior to Turner's

purchases "the [news]papers were filled with news of FCA's financial difficulties and its previous unsound lending practices." Id., at 10a-11a. Specifically, in 1985, the New York Times called FCA 'the most explosive, speculative stock on the New York Exchange'". Id. The American Banker stated in its September 22, 1986 article that "the company is out of danger, but still about three years away from being financially sound . . . potential decreases in real estate values, however, could still result in increased reserves in the fourth quarter." Id., at 11a. Business Week's March 10, 1986 article, published shortly before Turner's initial purchases, referred to FCA as "Financial Corpse of America" and quoted FCA President William J. Popejoy as stating "I hope expectations aren't getting too high." Id., at 11a-12a. Under the well established standards for materiality, the Ninth Circuit properly ruled that no

10b-5 liability exists where the total mix of negative information available about the stock is widely disseminated.

Furthermore, the Ninth Circuit properly applied the standards for reliance when ruling that even if material misstatements or omissions existed, Turner's own deposition testimony precluded any finding of reliance. Pet. App. at 13a. Turner performed his own detailed financial analysis using Lotus 1-2-3 spreadsheets, and subscribed to several stock reporting services which gave FCA the lowest safety rating as a "risky" investment. Pet. App. at 12a-13a. Furthermore, Turner admitted that one of the reasons he purchased the FCA Stock was because American was a potential buy-out candidate. The judgment in favor of respondents on the basis that Turner could not establish the reliance element of his claim is well supported.

REASONS FOR DENYING THE PETITION

The Ninth Circuit's decision is premised upon the standards for summary judgment articulated in In re Apple Computer Securities Litigation, 866 F.2d 1109 (9th Cir. 1989), cert. den. 496 U.S. 942 (1990). Turner cites no circuit court decision in conflict. The Ninth Circuit further relied on this Court's decisions in Basic, Inc., supra, and Virginia Bankshares, Inc., supra, for the standard of when an omission or misrepresentation, respectively, is "material" for purposes of a 10b-5 claim. Finally, the Ninth Circuit's de novo review of the record resulted in the proper conclusion that Turner could not establish the reliance element of his claim due to the broadly disseminated information about the risks of the FCA Stock and Turner's admitted knowledge of those risks.

1. The Ninth Circuit Properly Applied the Standard For Summary Judgment.

The Ninth Circuit reviewed the summary judgment de novo, relying upon In re Apple Computer Securities Litigation, 866 F.2d at 1112. The Ninth Circuit further relied upon In re Apple Computer Securities Litigation for the proposition that a plaintiff must prove "materiality" and "reliance" to prevail on a 10b-5 claim. Pet. App. at 5a-6a. The Ninth Circuit, quoting that decision, ruled that summary judgment for defendants is proper 'where there can be but one reasonable conclusion' as to "materiality" or "reliance." Pet. App. at 6a; In re Apple Computer Securities Litigation, 886 F.2d at 1112-13. Turner has cited no circuit court decision in conflict with these principles, nor are respondents aware of any such authority.

2. The Ninth Circuit Properly Applied The Standards For Materiality of and Reliance on Alleged Misrepresentations.

Turner's primary claim concerning a misrepresentation by defendants was that American President William Popejoy was overly optimistic about American, stating "we're out of harm's way." Pet. App. at 6a-7a. The Ninth Circuit quoted Virginia Bankshares, Inc., 111 S.Ct. at 2760, for the test for whether an alleged misrepresentation was material:[1/]

> "Not every mixture with the true will neutralize the deceptive. If it would take a financial analyst to spot the tension between the one and the other, whatever is misleading

---

1/ Virginia Bankshares, Inc. involved a claim under Section 14 of the 1934 Act. The Ninth Circuit applied that materiality standard to this 10b-5 action, citing Basic, Inc. where this Court held that the materiality elements of Section 14 and 10b-5 claims were identical. Consistent with the Ninth Circuit, one District Court in a published decision applied the Virginia Bankshares, Inc. materiality standard to a 10b-5 claim. See In re Meridian Securities Litigation, 772 F. Supp. 223, 226 n. 3 (E.D. Pa. 1991).

> will remain materially so, and liability should follow."

Pet. App. at 8a. The Ninth Circuit faithfully applied this test and concluded that the alleged misrepresentations by Mr. Popejoy were not "material."

The Ninth Circuit further ruled that, even if the statements were knowingly false:

> "Turner's claim fails because he was exposed to such a morass of contrary information that it was not reasonable for him to rely solely upon Popejoy's optimistic statements as evidence that all the other available information was inaccurate . . . "

Pet. App. at 9a. Again, the Ninth Circuit followed this Court's teaching. Specifically, the Ninth Circuit relied upon Basic, Inc. for the proposition that "reliance requires demonstration of a causal connection between a defendant's misrepresentation and a plaintiff's injury." Pet. App. at 9a. Although reliance on publicly available information is presumed, that presumption is rebutted by "any showing that severs the link

between the alleged misrepresentation . . . and his decision to trade at a fair market price." Pet. App. at 10a. Based upon the myriad of negative information about American in the media and in American's disclosures, the Ninth Circuit properly concluded that "the causal connection between Popejoy's statements and Turner's purchases and losses is missing in this case." Pet. App. at 10a; see also supra, at 6, referencing various news articles that disclose the precarious financial condition of American. That decision is amply supported by the factual record, and does not merit this Court's review.

3. The Ninth Circuit Properly Applied The Standards For Materiality of and Reliance on Alleged Omissions.

The Ninth Circuit identified Turner's primary claim concerning omissions: FCA failed to disclose the inadequacy of the loan loss reserves for American. This

claim, however, was properly dismissed based upon the following undisputed facts:

> 1. The 1985 10-K disclosed the increase of loan loss reserves by $422 million in 1984 and $182 million in 1985;
>
> 2. The 1985 10-K disclosed that FCA was still reviewing the loan portfolio; and
>
> 3. The media reported that the loan loss reserves were expected to be raised.

Pet. App. at 14a. Furthermore, Turner testified at his deposition that he was unable to "point to something" in the 1985 10-K and "say it was a misstatement." Id.

Turner's additional claims of omissions were also properly dismissed.[2/] Although

---

2/ Turner also claimed that FCA did not disclose that American was a takeover candidate. This was well documented in the press, known by Turner, and actually one of the reasons he purchased the stock. Pet. App. at 17a. Turner also claimed at the trial court level that FCA did not disclose that the unqualified audit opinion was premised upon a letter of support from the Federal Home Loan Bank Board. The

(continued to next page)

Turner was correct that a Proof of Loss statement filed by the company with its insurance carrier was not disclosed, the fact of the problem loans dealt with in the Proof of Loss was widely disclosed. Pet. App. at 15a. Furthermore, Turner at deposition could not identify anything in the Proof of Loss, in terms of "financially, numbers, dollars and cents" that was not reported in the 1985 10-K. Id. These alleged "omissions" concerned information broadly disclosed to the market, and accordingly cannot form the basis of a securities fraud claim. In any event, they raise no questions for this Court to review.

(continued from previous page)

2/ Ninth Circuit properly ruled that the letter of support was reprinted in full in the 1985 10-K. Pet. App. at 18a. The fact that the unqualified audit opinion was premised upon the letter of support was also reported by the Wall Street Journal three weeks prior to Turner's initial purchase of FCA Stock. Pet. App. at 116a-117a.

4. The Ninth Circuit's Decision Is Not Premised Upon A Fraud on the Market Theory.

Turner asserts that the District Court, and presumably the Ninth Circuit, erred by using the "fraud on the market" theory "for the sole purpose of holding Turner constructively on notice of selected negative information." Pet. at 31-32. Turner's argument confuses the test for "materiality" with the "reliance" element of a 10b-5 claim.

Initially, the "fraud on the market" theory establishes under certain circumstances a rebuttable presumption that a plaintiff in a 10b-5 action relied on a misstatement determined to be "material." Such reliance on a material misstatement is presumed based on the rationale that the stock purchaser indirectly relied on the alleged misstatement by relying on the integrity of the stock price established by the market. In re Apple 886 F.2d at 1113-14, citing Blackie v. Barrack, 524

F. 2d 891, 906 (1975), cert. den. 429 U.S. 816 (1976).

The Ninth Circuit's reference to the negative information about FCA disclosed to the market concerned the test for "materiality." That test, as articulated in Basic, Inc., supra, Virginia Bankshares, Inc., supra, weighs the alleged misrepresentation or omission against the information already publicly disclosed to determine "materiality." This is distinct from the "fraud on the market" theory, which involves the reliance element of a 10b-5 claim after a showing of "materiality" is made. Furthermore, the Ninth Circuit specifically found that even if the presumption of reliance was applicable, "the causal connection between Popejoy's statement and Turner's purchases and losses is missing in this case." Pet. App. at 10a. Their analysis adhered to settled principles and presents no issue worthy of review.

CONCLUSION

The principal issues presented for consideration by Turner's petition for a writ of certiorari concern well established principles of "materiality" and "reliance" set forth by this Court in Basic, Inc., supra, and Virginia Bankshares, Inc., supra. The Ninth Circuit's application of these principles to the facts surrounding Turner's stock purchases should not be disturbed, or even accepted for consideration. For these reasons, the petition should be denied.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER
PETER J. THURSTON*
EDWARD W. SMITHERS

DATED: August 7th, 1992

Edward W. Smithers

Attorneys for Respondents, WILLIAM J. POPEJOY, VICTOR H. INDIEK, MERRIL BUTLER, DONALD E. ROYER, AND NEIL N. STOLZ

BARTON, KLUGMAN, &
OETTING
RICHARD F. OETTING
PAUL I. WAPNER*

DATED: August 7th, 1992

Paul I. Wapner/EWS
Paul I. Wapner*

Attorneys for
Respondents,
ROBERT M. BARTON,
ANNELISE G. ANDERSON,
and EDWIN L. JOHNSON

PAUL, HASTINGS,
JANOFSKY & WALKER
DOUGLAS C. CONROY

DATED: August 7th, 1992

Douglas C. Conroy/EWS
Douglas C. Conroy

Attorneys for
Respondent,
J. RALPH STONE

LATHAM & WATKINS
HUGH STEVEN WILSON
JOHN P. FLYNN

DATED: August 7th, 1992

John P. Flynn/EWS
John P. Flynn

Attorneys for
Respondent,
LAWRENCE K. ROOS

McCUTCHEN, DOYLE,
BROWN & ENERSEN
JOHN R. REESE*
DALE E. BARNES, JR.

DATED: August 7th, 1992

John R. Reese/Cbg
John R. Reese*

Attorneys for
Respondent,
KPMG PEAT MARWICK

*Counsel of Record

7272V

APPENDIX

The pertinent statutory provisions which were not reproduced in the Pet. App. are Federal Rule of Civil Procedure 56 and Section 1961 of the Racketeer Influenced and Corrupt Organization Act ("RICO"). Pertinent excerpts from the District Court's hearing are also reproduced.

Federal Rule of Civil Procedure 56 provides in full:

> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers of interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entiled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed

established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or

depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may adjudged guilty of contempt.

Section 1961 of RICO subsections (1), (4), and (5) provide:

(1) "racketeering activity" means (A) any act or threat involving murder kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and

welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2312 and 2313 (relating to

interstate transportation of stolen motor vehicle), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffice), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

. . . .

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of

which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

. . . .

The pertinent provisions from the reporter's transcript from the United States District Court, appearing respectively at p. 11:3-12:24 and p. 20:2-11, are as follows:

> The Court: Let me tell you what I think ought to happen. I am going to do something a little unusual in this case.
>
> Even with firms like Millberg Weiss, and so forth, representing plaintiffs in cases like this it sometimes seems like it takes forever to get through the pleadings stage.
>
> We have a myriad of defense motions, and we have motions -- then, of course, particularly now you know what the Ninth Circuit would do if I dismissed any of the claims without leave to amend and instructions as to how to do it right since Mr. Turner is representing himself.
>
> I'm not sure, with all due respect to Mr. Turner, what we are going to get when we get it back, because there are some things that are allegations that relate to what is puffery and there are other things that is [sic] allowed.
>
> I mean, somebody stands on the top -- I don't know -- of half dome, or whatever, and says: We are solid as this. I think you can sue Prudential. When they also stand on the rock and if something happens

and they sink a little bit -- those are the sort of generalized, say, puffery statements for which you can't recover.

There are, however, specific either omissions or misrepresentations that, if you relied upon them, one can recover. And I think probably the best way to get to the heart of this case and the soonest, most expeditious is to have you take the plaintiff's deposition and pin down exactly what representations he does claim he relied on and get the kind of specificity that is necessary.

Find out whether his reliance was reasonable, and all of those other good things that you need to know in order to know if there are valid claims here. And then come back here with motions that really, I guess, should be recharacterized as motions for summary judgment.

In other words, let's just get out of this pleadings phase, another round of motions to dismiss which I envision down the road. Find out what he has to say at a deposition, and make your motion for summary judgment as appropriate. And let's really pin this case down and see what it looks like.

How long will it take for you to depose him and to set a deposition? And let's not make it a marathon deposition, but I know that it is going to take some time. I don't know how straight on Mr. Turner will answer your questions. But also there are a lot of allegations here.

But it is a lot easier, I think, for you to pinpoint them in a deposition than it is to do this through pleading practice.

How long will it take you?

. . . .

And if, in fact, I am satisfied there is additional discovery that you need in order to respond, I won't decide those aspects of the motion until you get the discovery.

Okay. But this is really -- it's to narrow down what the claims are in this case and figure out exactly what they are.

Because if I had to deal with a motion to dismiss, I would have to dismiss and strike a significant part of it and give you leave to amend, and we would be back here again.

I think this advances us much more quickly on where we need to go. Okay, counsel. Any questions?